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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF SAN DIEGO, Plaintiff and Appellant, v. MISSION VALLEY PARTNERSHIP et al., Defendants and Respondents.	D052505, D053431 (Super. Ct. No. GIC878013)

CONSOLIDATED APPEALS from a judgment and orders of the Superior Court of San Diego County, Yuri Hoffman, Judge. Affirmed.

The City of San Diego (the City) appeals a judgment entered by the superior court after sustaining without leave to amend a demurrer to its breach of contract cause of action against the Mission Valley Partnership, Hazard Center Investors, LLC, H.P. Mission Valley II, LLC and Calmat Co. (collectively, the Respondent Property Owners) and others and orders awarding them attorney fees. It contends the superior court erroneously concluded that the provisions of the contract required it to hold a hearing and

make certain findings and to give 30 days' notice of the breach before filing suit and thus erred in finding in the Respondent Property Owners' favor. Because we conclude the superior court correctly found that the City was required to give a 30-day notice and the allegations of the City's first amended complaint failed to allege that such notice was given, we affirm the judgment and the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In accordance with the standards for reviewing a superior court decision sustaining a demurrer without leave to amend, the following factual recitation is based on the allegations of the operative pleading, the City's first amended complaint (see *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126).

In January 1983, the City and a number of property owners who owned properties adjacent to the San Diego River (the Property Owners) entered into a written 20-year contract, designated as the "First San Diego River Improvement Project Development Agreement" (the Agreement), pursuant to Government Code section 65864 et seq. (described by the City as the "Development Agreement Statute" and referred to herein as the Act) The Agreement authorized the Property Owners to develop their properties as provided in a designated specific plan, in exchange for their agreement to provide substantial public improvements, including flood control improvements, landscaping, public trails, recreational facilities and street improvements, on those properties. The Agreement required the Property Owners to pay all of the costs associated with the improvements except to the extent that a Maintenance Assessment District was formed and raised funds for such improvements.

Paragraph 13 of the Agreement specified that the City would conduct a periodic review at least once every 12 months and required the Property Owners to demonstrate their good faith compliance with the terms of the Agreement as part of such a review. (See also Gov. Code, § 65865.1; San Diego Mun. Code, § 105.0108.) It further provided that a Property Owner would be considered to be in default "upon a finding and determination by . . . the City following [the periodic review], that upon the basis of substantial evidence the [Property] Owner has not substantially complied in good faith with one or more material terms or conditions" thereof, subject to certain exceptions which would render the owner's non-performance excused. If the City made such a finding, the Agreement authorized it to terminate or modify the Agreement, unilaterally and without the consent of the affected Property Owner, as to that owner. Its default provisions also specified that in the event of a default by either the City or a Property Owner, the nondefaulting party had to give the defaulting party 30 days' notice before "tak[ing] any legal or equitable action to enforce its rights [thereunder]."

In December 2002 (just prior to the expiration of the Agreement's 20-year term), the City sent letters to the Property Owners, informing them that additional work on the flood channel for the San Diego River and a number of other improvements required by the Agreement were still outstanding and that they needed to perform or, to the extent that insufficient funds existed in the maintenance assessment district, pay for these improvements. Although certain of the Property Owners indicated that they would comply with their contractual obligations in this regard, none of them in fact did so and thus upon the expiration of the Agreement, they defaulted thereunder.

In January 2007, the City filed this action for breach of contract, nuisance and declaratory relief against the Property Owners. After the superior court sustained demurrers by the Respondent Property Owners with leave to amend as to these causes of action, the City filed its first amended complaint that reasserted claims for breach of contract and nuisance. The Respondent Property Owners again demurred, arguing in part that the City's complaint failed to state valid causes of action because the City had not alleged that it had found the Property Owners in default under the Agreement or that it had given the Property Owners 30 days' notice of their default, each of which was required pursuant to the terms of the Agreement as a prerequisite to filing suit. The superior court found these arguments persuasive and, on that basis, sustained the demurrers to the breach of contract cause of action without leave to amend, although it granted the City leave to amend its nuisance cause of action on the basis of some duty other than that arising under the Agreement.

The City opted not to file another amended complaint, but instead noticed an appeal from the court's ruling sustaining the Respondent Property Owners' demurrers. (The City's notice of appeal also referred to another order of the superior court denying its request to certify a defense class in this case; however, the City has not raised any argument in its appellate briefs relating to that ruling and thus has abandoned any such challenge herein.)

DISCUSSION

1. *General Principles Regarding Development Agreements*

The purpose of the Act is to encourage comprehensive planning and reduce the economic costs of development by providing greater certainty for developers who may have no vested right to complete a project. (Gov. Code, § 65864.) In furtherance of this purpose, the Act authorizes a city or county to enter into a development agreement with a property owner for the development of a particular property, whereby the parties agree that the development project will be governed by land use regulations then in effect, thus protecting the developer from changes in land use regulations that may occur during the period of development. (Gov. Code, §§ 65865, subd. (a), 65865.4, 65866; *City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1193, fn. 6; *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1213.) The Act specifically provides "[u]nless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the agreement." (Gov. Code, § 65866.)

The Act imposes certain requirements relating to development agreements, including that the city or county approve such an agreement by ordinance after a public hearing, that the agreement's terms be consistent with the general plan and any applicable specific plan and that the agreement be recorded. (Gov. Code, §§ 65867, 65867.5,

65868.5.) The Act further requires that the contracting governmental entity conduct a review of a property owner's compliance with the terms of the agreement at least once every 12 months (Gov. Code, §§ 65865, 65865.1) and authorizes the city or county to terminate or modify the agreement if such review results in a finding that the property owner has not complied in good faith with the terms of the agreement. (Gov. Code, § 65865.1; see generally *Santa Margarita Area Residents Together v. San Luis Obispo County* (2000) 84 Cal.App.4th 221, 226-227.)

2. *Interpretation of the Agreement*

As alluded to above, the Agreement included the following provisions:

> "13. Default of Owner.
>
> "(a) An Owner shall be in default under this Agreement upon a finding and determination by [the City] following a periodic review as provided under Paragraph 10 hereof, that upon the basis of substantial evidence the Owner has not substantially complied in good faith with one or more of the material terms or conditions of this Agreement;
>
> "(b) Nonperformance of an Owner shall be excused if it is prevented or delayed by acts of God, war, acts or omissions of [the] City, acts of omissions of third parties which are not a party to this Agreement, including but not limited to other governmental agencies, or other causes beyond the reasonable control of the Owner.
>
> ". . . . . .
>
> "16. Procedure Upon Default.
>
> "(a) Subject to subparagraphs (c) and (d) of this Paragraph . . . , upon default by [a Property Owner], the City may terminate or modify this Agreement as to such [Property Owner] in accordance with the procedures set forth herein, provided, however, that any such modification of this Agreement . . . shall be done with the intent to carry out the objective of this Agreement and to accomplish

> that plans for the development of the [properties] as set forth in the [designated specific plan].
>
> "(b) All remedies at law or in equity whether or not specifically governing development agreements are available to the parties to pursue in the event of default, expressly including the remedy of specific performance of this Agreement or an action at law for damages. Any remedies of the parties shall be cumulative;
>
> "(c) Upon the occurrence of an event of default by either party, the party not in default (the "Nondefaulting Party") shall give the party in default (the "Defaulting Party") written notice of the default. The Defaulting Party shall have thirty (30) calendar days from the date of notice (subject to subsection (d) below) to cure the default if such default is curable within such thirty (30) days. If such default is so cured, then the Nondefaulting Party may not take any further action to enforce its rights;
>
> "(d) Should the default not be cured within thirty (30) calendar days from the date of notice, or should the default be of a nature which cannot be reasonably cured within such thirty (30) day period and the Defaulting Party has failed to commence within said thirty day period and thereafter diligently prosecute the cure, the Nondefaulting Party may then take any legal or equitable action to enforce its rights under this Agreement.
>
> "(e) Notwithstanding the provisions of paragraphs 12. and 16.(b) hereof, if the events set forth in paragraph 11.(a) [relating to the Property Owners' obligation to pay the costs of improvements not covered by a special assessment district] fail to occur, then the sole remedy of the City, subject to paragraph 16.(c), shall be to terminate this Agreement."

(Subparagraph (e) was not included in the original Agreement, but was added by an amendment thereto dated August 1, 1983.) In the proceedings below, the Respondent Property Owners argued, and the superior court agreed, that these provisions required the City, as a precondition to filing an action for any breach thereunder, to (A) hold a hearing and find that they had failed to substantially comply in good faith with one or more material

terms or conditions of the Agreement and (B) give them 30 days' notice of their default and an opportunity to cure (or begin to cure) the default. The City contends that the superior court disregarded the basic rules of contract interpretation in reaching its conclusion.

In accordance with those rules, the mutual objective intention of the parties at the time of contracting governs (Civ. Code, § 1636) and that intent is to be inferred, if possible, solely from the written provisions of the contract. (Civ. Code, § 1639.) In the absence of extrinsic evidence that the parties applied some special meaning to the terms used, the "clear and explicit" meaning of those terms, as interpreted in their "ordinary and popular sense," controls judicial interpretation. (Civ. Code, § 1638; see also *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.) Here, there are no allegations of matters extrinsic to the Agreement supporting a conclusion that the parties intended the word "default" to have any specialized meaning and under such circumstances our review of the superior court's decision is de novo. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1511; see also *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73 [the interpretation of a written instrument presents a question of law unless it turns on the competence or credibility of extrinsic evidence or a conflict therein].)

A. The Requirement of a Hearing and a Finding of Failure to Substantially Comply in Good Faith

The Respondent Property Owners contend that Paragraphs 13(a) and 16(a) show that a Property Owner cannot be held in breach of the Agreement until after the City holds a hearing and makes the necessary finding of lack of substantial compliance in good faith. However, in light of provision of the Act requiring that a property owner substantiate its

good faith compliance with its obligations under a development agreement on at least an annual basis, the inclusion of these provisions in the Agreement does not, on its face, clearly establish an intent by the parties that a Property Owner's failure to comply with its obligations thereunder is not actionable unless the City holds a hearing and makes the necessary finding.

Specifically, although paragraph 13(a) states that an owner will be considered in default after a hearing at which the City makes a no substantial compliance in good faith finding, it does not also state that that is the only situation where an owner can be in default under the Agreement. Further, the word "default" is not expressly defined (in fact the Agreement uses the words "default," "breach" and "nonperformance" synonymously) and thus, in accordance with the rules of contract interpretation, the resulting inference is that the parties intended "default" to have its ordinary and common meaning, i.e., "[t]he omission or failure to perform a legal or contractual duty . . . ." (*English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143, quoting Black's Law Dict. (7th ed. 1999) p. 428; *Lindley v. Sale* (1934) 140 Cal.App. 662, 667.)

Respondent Property Owner Calmat Co. contends, however, that because the Agreement creates vested rights on the part of property owners relating to the development of their properties, constitutional due process principles require that the City hold a hearing before filing suit. We disagree. While a property owner may well have procedural due process rights arising out of its right to develop its property in accordance a development agreement, Calmat has not cited us any authority establishing that a property owner has a right to a hearing before the governmental agency brings a lawsuit against that owner for its

breach of the development agreement. (See *Board of Regents v. Roth* (1972) 408 U.S. 564, 569, 577 [recognizing that constitutional due process protections "apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property"]; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-615 ["[d]ue process principles require reasonable notice and opportunity to be heard before government deprivation *of a significant property interest*" (italics added)].) Moreover, we are confident that there is no authority to support a contention that a property owner has a "legitimate claim of entitlement" in not being sued for breach of its contractual obligations.

At best, the provisions of the Agreement are ambiguous as to whether the City is required to comply with paragraph 13(a) as a prerequisite to filing an action for any breach thereof. (See generally *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 [recognizing that an agreement is ambiguous if it is susceptible of more than one reasonable construction].) Because the relevant language does not clearly and unambiguously establish such a prerequisite, the superior court erred in sustaining the Property Owners' demurrers to the City's first amended complaint on that basis.

B. Notice

Paragraphs 16(c) and (d) provided that a party "shall give" written notice of a default thereunder to the defaulting party and that, if the defaulting party fails to cure the default within 30 days (or commence and pursue such cure, if it could not reasonably be effected within a 30-day period), the noticing party "may then take any legal or equitable action to enforce its rights under this Agreement." This language is clear and unambiguous that a 30-day notice is a prerequisite to an action for breach of the Agreement.

The City admits as much in its reply brief, wherein it says that this provision required notice to be given only where it "elected to require the [Property Owners] to remedy the situation rather than modify or terminate the agreement"; in accordance with the allegations of the first amended complaint, this is precisely what it elected to do here. The City goes on to argue, however, that (i) the notice requirement applied only to a Property Owner who had been found by it to be in default at a periodic review hearing and (ii) even if the Agreement required notice for other types of defaults, that requirement only applied to defaults that could be cured in 30 days and since there was no breach until the Agreement expired by its terms, the Property Owners could not have cured their default within 30 days. Neither of these arguments is compelling.

Paragraph 16(c) requires that a nondefaulting party give notice of any "event of default" to the defaulting party. Thus, the application of this provision would be limited, as the City suggests, to situations where the Property Owner was found to be in default at a periodic hearing only if that was the sole way for a Property Owner to be in default under the Agreement. This is contrary to the City's contentions elsewhere in its brief and, as discussed above, the Agreement is at best ambiguous in this regard. More importantly, this is contradicted by the allegations of the first amended complaint, which clearly establish that the Property Owners in fact breached the Agreement. In light of the express allegations of breach, the City's argument that it was not required to give notice makes no sense.

The City's argument that it was not required to give notice of default because the Property Owners' alleged defaults could not be cured within 30 days is equally unavailing. Paragraph 16(d) of the Agreement expressly provided that if a Property Owner's default

could not reasonably be cured within 30 days, that owner was required, upon receipt of notice from the City, "to commence within said thirty day period and thereafter diligently prosecute [a] cure[.]" It further provided that, if the Property Owner failed to do so, then the City could "take any legal or equitable action to enforce its rights under this Agreement."

In accordance with its terms, the notice provision applied regardless of whether the underlying default was curable within 30 days or not and the City's failure to provide such notice is fatal to this action against the Property Owners for breach of the Agreement. Accordingly, the superior court correctly sustained the Respondent Property Owners' demurrers to the first amended complaint on this basis.

DISPOSITION

The judgment and orders are affirmed. The Respondent Property Owners are awarded their costs of appeal.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P.J.

O'ROURKE, J.